IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DYNO-E COMERCIAL, LLC, derivatively on behalf of GTM INTERNATIONAL, LLC; Plaintiff; v. **JUAN ANDÚJAR FEBO; GTM INTERNATIONAL, LLC;** Defendants.	Civil No.: **COMPLAINT FOR DECLARATORY JUDGEMENT OF UNENFORCEABILITY OF PATENT; DERIVATIVE ACTION**

VERIFIED COMPLAINT

TO THE HONORABLE COURT:

COMES NOW, Plaintiff GTM INTERNATIONAL, LLC (hereinafter, "GTM"), through DYNO-E Comercial, LLC (hereinafter, "DYNO-E"), and through the undersigned attorneys, respectfully alleges, states and prays as follows:

I. INTRODUCTION

1. GTM is the result of an alliance between foreign investors willing to invest fifty-million dollars ($50,000,000.00) to commercialize the DYNO-E Technology (as defined below), patented by Defendant Andújar.

2. Relying on Puerto Rico's self-portrayal as a jurisdiction welcoming of foreign investment, and recognizing the Commonwealth's expertise in manufacturing, GTM, a Puerto Rico company, foresaw a mutually beneficial opportunity to manufacture locally the DYNO-E Technology.

3. GTM did invest, to this date in excess of four million dollars ($4,000,000.00), for

the acquisition of the rights to the DYNO-E Technology, including the Original Patent (as defined below).

4. But, to GTM's surprise, Defendant Andújar now claims to own a Concealed Patent, related to the DYNO-E Technology and has threatened its enforcement against GTM.

5. This action seeks relief for GTM from the imminent threat of patent infringement through a declaration of unenforceability of the mischievously Concealed Patent.

6. U.S. patent laws and regulations state that the Concealed Patent will be enforceable only for and during such period that said Concealed Patent is **commonly owned** with the Original Patent. 35 U.S.C. § 253 and 37 C.F.R. § 1.321(c)(3).

7. Because the Original Patent and the Concealed Patent are not currently commonly owned, the Concealed Patent is unenforceable.

8. Declaratory relief is warranted to determine that the Concealed Patent is currently unenforceable.

9. The infringement allegations by Defendant Andújar put at risk the multi-million dollar investment made by GTM and the good name of Puerto Rico as a center for investment and manufacturing.

II. THE PARTIES

10. GTM is a limited liability company organized under the laws of the Commonwealth of Puerto Rico with its principal place of business at Palmas Industrial Park, lot #17 RD, 869, Cataño, P.R. 00962. GTM is included as a defendant nominal party for purposes of the derivative action presented in its benefit.

11. Plaintiff DYNO-E is a limited liability company organized under the laws of the Commonwealth of Puerto Rico with its principal place of business at 162 Villas de Golf Oeste, Dorado del Mar, Dorado, P.R. 00646. Plaintiff DYNO-E has uninterruptedly been and continues to be the majority owner (51% participation) of GTM since at least February 18, 2016. DYNO-E is a party to this action as a conduit for GTM.

12. Defendant Juan Andújar Febo is a resident of Puerto Rico with residence at Grand Palm 1, 51, Palma Real C13, Vega Alta, P.R. 00692.

III. JURISDICTION AND VENUE

13. Jurisdiction is conferred upon this Honorable Court by 28 U.S.C. § 1331 and § 1338(a) since the matter in controversy arises under the Patent Act of the United States, a federal statute. 35 U.S.C. §§1 et seq.

14. Defendants are subject to this Court's specific and general personal jurisdiction pursuant to due process, due to at least their residence in this judicial district and/or because substantially all of the operative facts, including Defendant Andújar's threats against GTM and GTM's business, arose in Puerto Rico.

15. Venue of this action properly lies in this Court pursuant to 28 U.S.C. § 1391 and 1400(b). This Court has personal jurisdiction over the Defendants because they reside in this judicial district, and have continuously done business in Puerto Rico, where Defendant Andújar has committed the acts that give rise to the claims asserted in this Complaint.

IV. NATURE OF THE ACTION

16. GTM seeks relief from the imminent threat of patent infringement through a

declaration of unenforceability of patent, which may be granted under the Declaratory Judgment ACT, 28 USC §§2201-22012, and Rule 57 of the Federal Rules of Civil Procedure.

17. DYNO-E, on behalf of GTM, also requests relief under Federal Rule of Civil Procedure 23.1 and 14 L.P.R.A. § 4003, governing derivative actions.

V. STATEMENT OF THE FACTS

The Two Patents to the DYNO-E Technology

18. On October 29, 2012, Defendant Andújar filed in the United States Patent and Trademark Office (hereinafter, the "USPTO") his first of two patent applications for the DYNO-E Technology. The application for patent was titled *Hybrid Electro Magnetic Hydro Kinetic High Pressure Propulsion Generator* (hereinafter, the "Original Application").[1] See, **Exhibit 1**, (Original Application). According to the written description of the Original Application, the "invention relates to a hybrid magnetically levitated AC electric generator with an independent high powered magnetic translator stack" (hereinafter, the "Dyno-E Technology"). See, **Exhibit 1**, (the Original Application), at page 1, paragraph 2.

19. The Original Application included a declaration under penalty of perjury signed by Defendant Andújar attesting that he was the sole inventor of the Original Application. See, **Exhibit 2**, (Declaration by Defendant Andújar).

20. On October 30, 2012, Defendant Andújar signed a Power of Attorney in the Original Application for patent agent Alexander Pokot, owner of the firm James Ray &

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[1] Application Num. 13/662,977; which claims priority of provisional application 61/552,833, filed on October, 28, 2011.

Associates Intellectual Property LLC.[2] See, **Exhibit 3** (Power of Attorney).

21. On May 16, 2014, the Original Application was approved[3] by the USPTO. See, **Exhibit 4**, (Notice of Allowance).

22. On August 18, 2014, Defendant Andújar, through his patent agent Mr. Potok, filed his second application for the DYNO-E Technology (hereinafter, the "Concealed Application"). See, **Exhibit 5**, (Concealed Application).

23. As in the Original Patent, Defendant Andújar filed a declaration under penalty of perjury signed by Defendant Andújar attesting that he was the sole inventor of the Original Application and a Power of Attorney in the Concealed Application for patent agent Mr. Pokot. See, **Exhibit 6**, (Second Declaration by Defendant Andújar) and **Exhibit** 7, (Second Power of Attorney).

24. The Concealed Application has the same title, written description, drawings and abstract as the Original Application. As shown below, the Concealed Patent explicitly establishes that it is related to the Original Application as a "continuation".

HYBRID ELECTRO MAGNETIC
HYDRO KINETIC HIGH PRESSURE PROPULSION GENERATOR

CROSS-REFERENCE TO RELATED APPLICATIONS

This patent application is a Continuation of U.S. Patent Application Serial No. 13/662,977 filed October 29, 2012, pending. This application is related to and claims priority from U.S. Provisional Patent Application Serial No. 61/552,833 filed on October 28, 2011.

See, **Exhibit 5**, (Concealed Application), p. 1. {Highlight ours}

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[2] Available at: http://www.jrayassoc.com/our-staff; last visited February 1, 2017.
[3] In patent jargon, the proper term for approval is "allowance or allowed".

25. A "continuation" application **claims the same invention claimed in an earlier application**, although there may be some variation in the scope of the subject matter claimed. Transco Prod. Inc. v. Performance Contracting, Inc., 38 F.3d 551, 555, (Fed. Cir. 1994).[4] {Emphasis and underline ours} See also, USPTO's Manual of Patent Examining Procedure (MPEP), 201.07 Continuation Application (R-07.2015), MPEP s 201.07: ("A continuation application is an application for the invention(s) disclosed in a prior-filed copending nonprovisional application, international application designating the United States, or international design application designating the United States. The disclosure presented in the continuation must not include any subject matter which would constitute new matter if submitted as an amendment to the parent application.")

26. In summary, the Concealed Application claims the same invention as the previous Original Application; that is, both applications claim the DYNO-E Technology.

27. On September 23, 2014 the Original Application was granted as Patent Number 8,841,789 (hereinafter, the "Original Patent"). See, **Exhibit 8**, (the Original Patent).

28. Other than formal amendments to the drawings and formatting, the Original Patent has the same content as the Original Application.

29. According to the face of the Original Patent document, Defendant Andújar was its inventor and owner. See, **Exhibit 8**, (the Original Patent), at p. 1.

30. On March 13, 2015, the USPTO allowed the Concealed Application. See, **Exhibit**

[4] Note that the Federal Circuit is the specialized court of appeals with exclusive jurisdiction in patent matters, subject only to review by the United States Supreme Court. 28 U.S.C. § 129 and 1254; 35 U.S.C. 141.

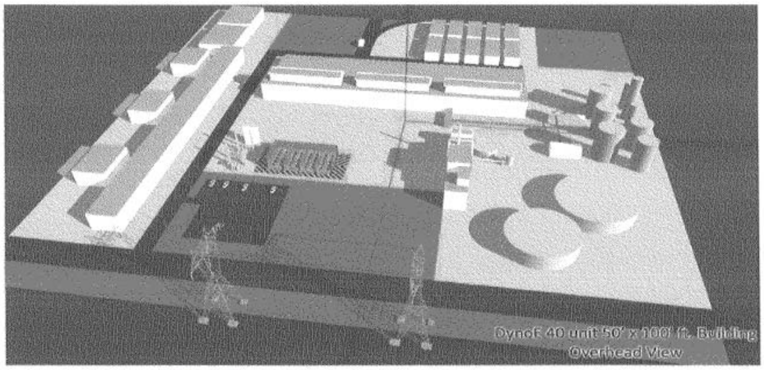
9, (Second Notice of Allowance).

31. On July 21, 2015 the Concealed Application was granted as Patent Number 9,088,187. See, **Exhibit 10**, (hereinafter, the "Concealed Patent").

32. Other than for seven (7) words modified in the claims and formatting, the content of Concealed Application and the Concealed Patent is identical.

33. The Original and the Concealed Patent (hereinafter, collectively, the "Related Patents") share the same drawings and the written description, which includes all the following sections: *Background of the Invention*, *Objects of the Invention*, *Summary of the Invention*, *Brief Description of the Drawings*, and *Brief Description of a Presently Preferred and Various Alternate Embodiments of the Invention*. See, **Exhibits 8 and 10**, (the Related Patents).

34. Among the drawings **included in both of the Related Patents** is figure 7, reproduced below, which expressly describes one possible use of the DYNO-E Technology to power a Chemical Manufacturing Plant. See, **Exhibits 8**, **and 10**, (the Related Patents), at p.8 and p.9, respectively. {Highlight ours}



40 DynoE units of 1MW each, 5MW are used to power
the Chemical Manufacturing Plant & the remaining 35MW are sold to the National Grid

FIG. 7

35. In summary, the Concealed Patent, claims the same invention as the previous Original Patent; that is, both patents claim the DYNO-E Technology.

36. According to the face of the Concealed Patent document, Defendant Andújar is its inventor. See, **Exhibit 10**, (the Concealed Patent), at p. 1.

GTM's Manufacturing Plans and Investment in the DYNO-E Technology

37. Since at least December 8, 2015, Mr. Alfredo Samano (hereinafter, "Mr. Samano"), Mr. Miguel Maza (hereinafter, "Mr. Maza"), Mr. Rogelio Lubel (hereinafter, "Mr. Lubel"), Mr. Héctor Aguilar (hereinafter, "Mr. Aguilar"), and Mr. Sergio Leiras (hereinafter, "Mr. Leiras") for themselves and/or in representation of DYNO-E, Ferretodo Mexico S.A. (hereinafter, "Ferretodo") and other companies (hereinafter, collectively, the "Investors") began negotiating with Defendant Andújar the rights to the DYNO-E Technology.

38. Mr. Samano's business experience is in the business of hardware stores and manufacture.

39. Mr. Maza's experience in business is in the finance and accounting areas.

40. Mr. Lubel's business experience is in the field of real estate.

41. Mr. Aguilar is a former director of General Electric in Latin America with experience in the energy sector.

42. Mr. Leiras business experience is in the field of renewable energies and new technologies.

43. The Investors developed interest in the DYNO-E Technology through the representations Defendant Andújar made to them.

44. The Investors had no knowledge of the laws of the Commonwealth of Puerto Rico or of the Patent Laws of United States.

45. However, they relied on Puerto Rico Government's portrayal of the Commonwealth as open to and welcoming of foreign investment, and that, in Puerto Rico, business agreements were held in high esteem and were duly enforceable under the law.

46. These factors, coupled to the recognition of Puerto Rico as a premier manufacturing center, lead the Investors to foresee a mutually beneficial alliance with Defendant Andújar to manufacture and commercialize the DYNO-E Technology on the island.

47. The alliance was formalized on or around February 18, 2016.

48. As a result, DYNO-E and ANDEL, Enterprises, LLC (hereinafter, "ANDEL") executed a Contribution Agreement to acquire respectively 51% and 49% ownership in GTM.

49. Before the execution of the Contribution Agreement, GTM was wholly owned by ANDEL. Presently, Defendant Andújar and his wife are the owners of ANDEL.

50. It was further agreed that the Management of GTM (hereinafter, the "Management") would be composed of six Managers.

51. DYNO-E and ANDEL would appoint three Managers each.

52. Presently, the appointed Managers are Mr. Maza, Mr. Samano, and Mr. Lubel, for DYNO-E (hereinafter, "the Managers appointed by DYNO-E")and Defendant Andújar, his wife and Enriquillo Romero (hereinafter, "Romero"), for ANDEL (hereinafter, "the Managers appointed by ANDEL").

53. On or around March 2016, GTM obtained a loan from Ferretodo to be used for

the commercialization of the DYNO-E Technology.

54. GTM began investing, and has now invested in excess of four million dollars ($4,000,000.00), to obtain the rights to and for the commercialization of the DYNO-E Technology.

The Assignment of the Original Patent to GTM by Defendant Andújar

55. On April 22, 2016, Defendant Andújar assigned the entire right, title and interest in the Original Patent to GTM making GTM the owner of the Original Patent (hereinafter, the "Assignment"). **Exhibit 11**, (Assignment from Defendant Andújar to GTM)[5]

56. The Assignment was consummated through written instrument acknowledged and subscribed by Defendant Andújar before Notary Public Paola Medina Prieto, with Affidavit Number 339. See, **Exhibit 11**, (Assignment from Defendant Andújar to GTM).

57. As the inventor of the Original Patent Defendant Andújar appears on the Assignment on behalf of himself, as the assignor, and also as authorized representative on behalf of GTM, the assignee. See, **Exhibit 11**, (Assignment from Defendant Andújar to GTM).

58. The Assignment was duly registered before the USPTO. See, **Exhibit 12,** (USPTO Patent Assignment Registration).[6]

Defendant Andújar's Threats of Enforcement of the Concealed Patent against GTM

59. During the representations and dealings described above, Defendant Andújar never disclosed the existence of the Concealed Patent.

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[5] See also at: http://legacy-assignments.uspto.gov/assignments/assignment-pat-38864-259.pdf
[6] Id.

60. However, members of GTM's Management discovered the existence of the Concealed Patent on or around December 15, 2016.

61. On December 19, 2016 GTM held a Management meeting.

62. The meeting was recorded with the consent of all the parties involved.

63. During the meeting, Defendant Andújar was confronted with the Concealed Patent.

64. Defendant Andújar admitted that the Concealed Patent was related to the Original Patent and the DYNO-E Technology.

65. In fact, Defendant Andújar admitted that the Concealed Patent arose from the Original Patent.

66. Defendant Andújar then claimed that the Concealed Patent was not related to energy generation, and that the Original Patent was the only one related to energy generation.

67. However, a look at the Concealed Patent shows that Defendant Andújar was attempting to, once again, mislead GTM.

68. The term energy appears **111 times** in the Concealed Patent, and **the term "generate electric energy" appears six times, including in claims 3, 11, 13**. See, **Exhibit 10**, (the Concealed Patent).

69. When GTM refused to accept Defendant Andújar's excuses, Defendant Andújar told GTM to "sue him".

70. Defendant Andújar further threatened to manufacture and commercialize the DYNO-E Technology with a new investor, and that, before any legal action against him could be

completed he would have been selling the DYNO-E Technology.

71. GTM responded to Defendant Andújar that the DYNO-E Technology had been assigned to GTM.

72. Defendant Andújar in turn responded to GTM that the patent (referring to the Concealed Patent) was still his property.

73. Because **the only powers granted by patents are the right to exclude others** from making, using, offering to sell, selling and/or importing the patented invention,[7] Defendant Andújar's words can only be considered threats of infringement of the Concealed Patent against GTM. See, United Shoe Mach. Corp. v. United States, 258 U.S. 451, 463, 42 S. Ct. 363, 367, (1922): ("From an early day it has been held by this court that the franchise secured by **a patent consists only in the right to exclude others** from making, using, or vending the thing patented without the permission of the patentee").

74. GTM has offered for sale, is currently developing and intends to use, sell, and/or commercialize the Dyno-E Technology; all of which could constitute acts of infringement of the Concealed Patent under 35 U.S.C.A. § 271.

75. The imminent threat of infringement is maximized given the fact that Defendant Andújar is currently looking for new investors to commercialize the DYNO-E Technology.

76. On January 10, 2017, Defendant Andújar created Specialized Metallurgical Engineering & Design LLC, a new limited liability company and is marketing through it the DYNO-E Technology and the Original Patent. See, **Exhibit 13**, (Certificate of Formation).

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[7] 35 U.S.C. § 271.

The Harm to GTM and the Management's Refusal to Act

77. Having GTM already obtained financing in excess of four million dollars ($4,000,000.00) in the acquisition of the rights to the Original Patent, research and the development of the Dyno-E Technology, among other related expenses, GTM considers it an absolute imperative to resolve the alleged infringement controversy.

78. On February 3, 2016, Mr. Maza, in writing, called upon the Managers and Members of GTM to hold a Special Meeting to demand that Defendant Andújar assign to GTM the Concealed Patent under the same conditions as the Original Patent (hereinafter, the "Demand").

79. The Demand further stated that, if Defendant Andújar refused to assign the Concealed Patent, that GTM file a complaint against him to defended GTM's rights and to ensure the Concealed Patent was currently unenforceable.

80. According to the Demand, the meeting would be held on February 7, 2016 at 10:00AM in GTM's offices.

81. However, the day before the meeting was to take place, the Managers appointed by ANDEL sent a letter to the Managers appointed by DYNO-E stating that they would not assist to the meeting, **that they would not take action regarding the Demand**, and because there would be no quorum, no action could be taken by GTM in that meeting.

VI. FIRST COUNT

Unenforceability of the Concealed Patent

82. Plaintiff realleges and incorporates by reference each and every allegation as if

fully set forth herewith.

83. The Patent Laws and Regulations of the United States establish that a Concealed Patent will be enforceable only for and during such period that said Concealed Patent is **commonly owned** with the Original Patent. 35 U.S.C.A. § 253 and 37 C.F.R. § 1.321(c)(3). Because Defendant Andújar alleges to be the sole owner of the Concealed Patent and GTM is the owner of the Original Patent, the Related Patents are not presently commonly owned, and the Concealed Patent is, therefore, currently unenforceable. Id.

84. The infringement threats by Defendant Andújar put at risk the multi-million dollar investment made by GTM to commercialize the DYNO-E Technology, and the trust of investors looking to forge alliances with entrepreneurs in Puerto Rico and grow the local economy.

85. Declaratory relief is warranted to determine that the Concealed Patent is currently unenforceable.

VII. SECOND COUNT

Derivative Action

86. Plaintiff realleges and incorporates by reference each and every allegation as if fully set forth herewith.

87. DYNO-E brings this action derivatively on behalf of and for the benefit of GTM to redress the wrongs claimed herein against Defendant Andújar.

88. DYNO-E is a Member of GTM and will adequately and fairly represent the interests of GTM and its Members by vindicating its patent rights that the Defendant Andújar

refuses to recognize. DYNO-E, on behalf of GTM, has retained counsel competent and experienced in the matters claimed in this Complaint.

89. DYNO-E was a Manager of GTM at the time of the relevant facts alleged herein and has continued to hold its interest in GTM since that time.

90. The wrongful acts complained of herein subject, and will persist in subjecting, GTM to continuing harm because the adverse consequences of the injurious actions are still in effect and ongoing.

91. The wrongful actions complained of herein were unlawfully concealed by the Defendant from the GTM's manager and directors and, when confronted with the actions, the Defendant persisted in his conduct.

92. DYNO-E has been the majority member of GTM since before and during the assignment to GTM of the Original Patent; continuing uninterruptedly through Defendant's threats of patent infringement of the Concealed Patent; and to this day continues to be.

93. GTM's Management has failed to and expressly refused to act on the Demand which would vindicate GTM's patent rights.

94. The Demand meets the requirements for a derivative action to be actionable by DYNO-E as majority owner of GTM.

95. Further, this Second Count is not a collusive one to confer jurisdiction that this court would otherwise lack since the court has independent federal question jurisdiction arising from the patent claims described in the First Count.

The Managers Appointed by ANDEL are Self-Interested Managers Regarding the Demand

96. In addition to the Manager's express refusal to act, the derivative action is actionable because the Managers appointed by ANDEL are Self-Interested Managers.

97. The Demand to vindicate GTM's patent rights directly affects Defendant Andújar's property, and therefore, also, his wife's. For that reason, they are interested Managers that cannot be expected to apply an independent and disinterested business judgment regarding the Demand.

98. Further, because Defendant Andújar and his wife control ANDEL, Romero cannot be expected to apply an independent and disinterested business judgment regarding the Demand affecting those who appointed him.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendant Andújar, as follows:

1. That the Court enters declaratory judgment in favor of Plaintiff on all the claims for relief set forth herein;
2. That the Court enters declaratory judgment of unenforceability of the Concealed Patent, so long as it is not Commonly Owned with the Original Patent;
3. That the Court grant such order, further and different relief, as the Court deem proper under the circumstances.

STATEMENT UNDER PENALTY OF PERJURY

I, Miguel Maza Vázquez, of legal age, married, resident of Dorado, Puerto Rico, hereby state under penalty of perjury, pursuant to the Laws of the United States of America, 28 U.S.C. §1746, that I have read the foregoing Verified Complaint and its supporting exhibits and that, to the best of my knowledge and belief, and/or pursuant to the information and documents in Plaintiff's possession, all allegations contained herein are true and correct.

DYNO-E Comercial, LLC

Miguel Maza Vázquez, Authorized Representative

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 8th day of February 2017.

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